CHIA SIA CHEK

v.

KETUA PENGARAH KASTAM, JABATAN KASTAM DIRAJA MALAYSIA & ORS

HIGH COURT MALAYA, ALOR STAR
ZAMANI A RAHIM JC
[ORIGINATING SUMMONS NO: 24-805-2006]
12 JUNE 2008

CUSTOMS AND EXCISE: *Seizure - Seizure and detention of motorcar - Application for return of motorcar - Whether there was reasonable cause to suspect that motorcar was uncustomed goods - Whether detention unlawful - Customs Act 1967, ss. 114(1), 115, 135 - Federal Constitution, art. 13(1)*

This was an application by the plaintiff, the current registered owner of a Honda Civic 1.6 EFI (A) motorcar bearing the registration number PDD 8281 ('Honda motorcar'), seeking, *inter alia*, a declaration that he was the legally registered owner of the Honda motorcar and its return under s. 115 of the Customs Act 1967 ('Act') after having been seized and detained by a customs officer from the Jabatan Kastam Diraja Malaysia, Sungai Petani. The ground of seizure and detention was for further investigation of the Honda motorcar as it was suspected to be uncustomed goods under the Act.

Held (allowing the plaintiff's application):

(1) The power to seize the Honda motorcar under s. 114(1) of the Act would only arise if there were reasonable cause to suspect that the plaintiff's motorcar was uncustomed goods. In this case, the relevant circumstances that had given rise to the suspicion that the Honda motorcar was uncustomed goods had not been shown. On the facts, nowhere in the customs officer's affidavit evidence and the exhibits annexed thereto were there shown circumstances to trigger reasonable cause or reason to suspect that the Honda motorcar was uncustomed goods and an offence committed under the Act or any regulation made thereunder. The reasonable cause of suspicion must exist before or at the time seizure was effected and in the absence of said cause, the seizure and detention of the Honda motorcar was unlawful and contrary to art. 13(1) of the Federal Constitution. Further, there was, on the facts, no

A evidence shown that the Honda was uncustomed goods; after the seizure, the investigation conducted by the first defendant did not establish that the Honda motorcar was uncustomed goods. For that reason, no prosecution was instituted against anyone, including the plaintiff, under s. 135 of the Act. As
B there was no reasonable cause before or at the time of seizure to justify the detention of the Honda motorcar, the plaintiff was entitled to an order for the Honda motorcar to be returned to him and also to damages. (paras 10, 11, 12, 13, 14, 23 & 24)

C

Case(s) referred to:

Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd [1986] 1 CLJ 2; [1986] CLJ (Rep) 45 SC ***(refd)***

Asia Commercial Finance (M) Bhd v. PP [1996] 1 LNS 308 ***(refd)***

Ketua Polis Ibu Pejabat Kontinjen Seremban, Negeri Sembilan & Anor v.
D *Manoharan Dorasamy [2004] 1 CLJ 101 FC* ***(refd)***

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***

Pesurohjaya Ibu Kota Kuala Lumpur v. Public Trustee & Ors [1971] 1 LNS 104 ***(refd)***

PP v. Mat Nawi Ismail [1987] 2 CLJ 83; [1987] CLJ (Rep) 914 HC ***(refd)***

E *Syarikat Raspand v. Government of the State of Sabah [2005] 7 CLJ 179 HC* ***(refd)***

Legislation referred to:

Criminal Procedure Code, s. 413

Customs Act 1967, ss. 2, 114(1), 115(1)(a), 128(2), (4), 132, 135

F Federal Constitution, art. 13(1)

Road Transport Act 1987, ss. 8, 10, 12, 17

Sabah Forest Enactment 1968, s. 37A

For the plaintiff - Chuah Hock Aik; M/s Law Chambers of YK Loo & Assoc
For the defendant - Tengku Intan Suraya Tengku Ismail SFC

G

Reported by Suresh Nathan

JUDGMENT

Zamani A Rahim JC:

H

Introduction

[1] The subject matter of the plaintiff application herein (encl. 1) involved a Honda Civic 1.6 EFI (A) motorcar, chassis number EH5-904503, engine number B16A-3411428 (previously the
I engine number was ME 516-204497), bearing registration number PDD 8281 (hereinafter referred to as "the original Honda motorcar").

[2] Before the plaintiff acquired ownership of the original Honda motorcar, it had three previous registered owners. They were firstly, O & G Engineering (Utara) Sdn. Bhd., registered as the first owner on 6 October 1951; secondly, Encik Tan Meng Seng, registered as the second owner on 14 March 2000, and thirdly, Puan Ang Gaik Ean, registered as the third owner on 2 January 2002.

Inspection Of The Plaintiff Motorcar

[3] The plaintiff was the fourth registered owner. It was registered in his name on 12 January 2004 after the original Honda motorcar had undergone major repairs. The second defendant as the Registrar of Motor Vehicles is under a duty to inspect every vehicle submitted for registration or transfer of registration. Sections 10 and 12 of the Road Transport Act 1987 stipulate as follows:

Application for registration:

10 (1) Every application for the registration of a motor vehicle shall be made in the prescribed form to the Director of a registration area and shall be signed by the person for the time being entitled to the possession of the motor vehicle.

(2) Notwithstanding anything in subsection (1), any person who satisfies the Director that he has been authorized in writing for that purpose by a person who is absent from Malaysia, may make application on behalf of that person for the registration of a motor vehicle, and in any such case the application shall be deemed to have been signed and made by that person.

(3) No motor vehicle shall be registered unless:

(a) such vehicle bears a clear, distinct and untampered engine and chassis number; and

(b) the prescribed fee has been paid,

(4) No motor vehicle shall be registered which does not comply with this. Act as to construction, weight, equipment, use and age unless such motor vehicle has been exempted from such compliance under powers conferred by this Act.

(5) An application for the registration of a motor vehicle which is the property of the Government or of a public body shall designate, by reference to his office, an officer in the service of the Government or public body, as the case may be, in whose charge such motor vehicle will be and such person for the time being holding such office shall, for the purpose of any offence, be deemed to be the registered owner of such motor vehicle.

(6) No officer shall be deemed by reason only of subsection (5) to be guilty of an offence committed before the date on which he assumed such office.

Inspection Of Motor Vehicles And Information Director General

12 (1) The Director General, a Director may at any time before registration of a motor vehicle require the motor vehicle to be brought to any convenient place specified by him and to be inspected and, if necessary, to be weighed and measured and after registration may at any time require a motor vehicle to be brought as aforesaid if he has reason to believe:

(a) that the motor vehicle does not comply with the requirements of this Act;

(b) that any information furnished to him in respect of the motor vehicle is false, incorrect or misleading;

(c) that the motor vehicle is not in a serviceable condition; or

(d) that the weight, dimensions, character, construction, colour, identifying particulars or seating accommodation have been altered after the registration thereof.

(2) The registered owner of a motor vehicle shall forthwith inform the Director in writing of any circumstance or event which affects the accuracy of any entry in the register relating to the motor vehicle, and shall at the same time forward or deliver to the Director the registration certificate relating to such motor vehicle.

(2A) The registered owner shall, in the case of a change of chassis of a motor vehicle, obtain the prior approval of the Director General before such change.

(3) The registered owner of a motor vehicle shall, whenever required by a Director so to do:

(a) forthwith furnish to the Director all such information as he may require for the purpose of verifying the entries relating to such motor vehicle in the register, and

(b) forthwith forward or deliver to the Director the registration certificate relating to such motor vehicle.

(4) After a motor vehicle has been inspected, weighed or measured under subsection (1), or upon receipt of any information or proof furnished in respect of a motor vehicle under subsection (2) or (3), the Director may make such amendments in the register and in the registration certificate relating to such motor vehicle as he may consider necessary, and shall return the registration certificate to the registered owner.

(5) Any person who without reasonable excuse fails to comply with any requirement of the Director General, a Director or a licensed registrar under subsection (1) or with subsection (2) or (3) shall be guilty of an offence.

Replacement Of Engine Number

[4] While the original Honda motorcar was in the possession of the third registered owner, Puan Ang Gaik Ban, it was involved in a road accident on 18 April 2002. It was badly damaged. Puan Ang Gaik Ban had submitted a "Total Loss Claim" to the insurers, Syarikat Kurnia Insurans (Malaysia) Berhad. The claim was duly paid to her in the sum of RM51,000.

[5] The badly damaged original Honda motorcar was sold by Syarikat Kurnia Insurans (Malaysia) Berhad to Syarikat Chin Huat Motor Sdn Bhd at a price of RM15,500 by way of tender.

[6] After the damaged original Honda motorcar was satisfactorily repaired, the plaintiff bought the same at the purchase price of RM30,000 (hereinafter referred to as "the repaired Honda/plaintiff motorcar"). The plaintiff has since fully settled its purchase price. At the risk of repetition, the repaired Honda/plaintiff motorcar was duly registered in the name of the plaintiff on 12 January 2004.

[7] Upon application by the plaintiff to the Road Transport Department (RTD), Penang, the engine of the repaired Honda/plaintiff motorcar was replaced. The replacement of the engine was duly approved by the second defendant pursuant to s. 17 of the Road Transport Act 1987 which provides as follows:

> **17. Director may refuse to issue motor vehicle licenses in certain cases**
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> (1) A Director shall not be required to grant any motor vehicle licence for which application is made unless:
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> (a) the registration certificate relating to the motor vehicle specified in such application is produced and the particulars contained in such application are identical with the corresponding particulars contained in such registration certificate;
>
> (b) the identifying particulars of the motor vehicle, including the engine and chassis number, remain clear, distinct and untampered and are identical with the corresponding particulars contained in such registration certificate;
>
> (c) the prescribed fee has been paid; and
>
> (d) he is satisfied that the applicant has no outstanding matter or case with the Road Transport Department or the Police relating to any contravention of or offence against this Act or the Commercial Vehicles Licensing Board Act 1987. [Am. Act A973]
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> (2) ...
>
> (3) ...
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> (4) ...
>
> (5) ...

(6) ...

(7) ...

(8) ...

[8] For the purpose of s. 12, the repaired Honda/plaintiff motorcar was brought to the second defendant to be inspected and to be weighed and measured, if necessary. Further, pursuant to s. 17, upon application to change the engine (see exh. "OM1"), the registration certificate was produced (see exh. "CSC1") to the second defendant. The second defendant was further duty bound to ensure that a) the particulars contained in the application form (see exh. "OM1") are identical with the corresponding particulars contained in the registration certificate, and b) the identifying particulars of the repaired Honda/plaintiff motorcar, including the engine and chassis number remain clear, distinct, and untampered and are identical with the corresponding particulars contained in the registration certificate. If physical structures of the repaired Honda/plaintiff motorcar are not identical to its registration certificate and the RTD register, the second defendant is under a duty to withhold its approval or to make the necessary amendments. In this case, the second defendant only made the amendment in respect of the engine number in the registration certificate. The old engine number ME 516-2-4497 was cancelled and replaced by the new engine number B16A-3411428 (see exh. "CSC1" in the plaintiff supporting affidavit affirmed on 25 April 2006). Therefore, if there are any discrepancies between the physical structures of the repaired Honda/plaintiff motorcar and its registration certificate or the RTD records, the plaintiff is not to bear the brunt.

Seizure Of The Plaintiff Motorcar

[9] Having used the repaired Honda/plaintiff motorcar peacefully and without interruption for almost two years, the said motorcar was on 24 January 2006, detained and seized by an officer of custom from Jabatan Kastam Diraja Malaysia, Sungai Petani. The ground of seizure and detention was for further investigation into the repaired Honda/plaintiff motorcar as its was suspected to be uncustomed goods under the Customs Act 1967. The first defendant power to seize goods which contravene the Customs Act 1967 is stipulated in s. 114 as follows:

114. Seizure of goods the subject of an offence

(1) All goods in respect of which there has been, or there is, **reasonable cause to suspect** that there has been committed any offence against this Act or any regulation made thereunder, or any breach of any of the provisions of this Act or of any regulation made thereunder or of any restriction or condition subject to or upon which any licence or permit has been granted, together with any receptacle, package, conveyance, vessel not exceeding two hundred tons nett registered tonnage, or aircraft other than an aircraft engaged in international carriage, in which the same may have been found or which has been used in connection with such offence or breach, and any books or documents which may reasonably be believed to have a bearing on the case, **may be seized by any officer of customs** in any place either on land or in territorial waters.

[10] The power to seize the repaired Honda/plaintiff motorcar under s. 114(1) would only arise if there is reasonable cause to suspect that the plaintiff motorcar is uncustomed goods. "Uncustomed goods" is defined in s. 2 to mean goods in respect of which a breach of the provisions of the Act or of any subsidiary legislation made thereunder has been committed. I am not unminded that whether reasonable ground of suspicion actually existed would entirely depend on or within the domain of normally the custom officer who seized the goods, be it uncustomed, dutiable or prohibited. The reasonable cause of suspicion may arise in various circumtances. For example, in *PP v. Mat Nawi Ismail* [1987] 2 CLJ 83; [1987] CLJ (Rep) 914 the goods were reasonably suspected to be dutiable. The facts are these. The respondent drove a car. He failed to stop when asked to do so at the customs road block. The customs chased the car. He abandoned the car and ran away. Dutiable goods were found in the car. The same morning the respondent surrendered himself. The respondent claimed that he was transporting the goods found in the car to another person. He disobeyed the customs requiring him to stop because he had thought duty had not been paid on those goods. Subsequently, he produced receipts indicating that payment of duties had been made on the goods. The customs then released the goods to him. The car was however detained. KC Vohrah J said:

> However if there are goods in the car, the power to seize the vehicle under s. 114(1) may arise. This power would only arise if there is reasonable cause to suspect that in respect of these goods there has been committed an offence against the Act or any regulation made thereunder.
>
> In the present case, the car was abandoned after a chase. Goods were found in the car. And they were **reasonably suspected to be dutiable** and therefore the car was **lawfully** seized. But the goods were subsequently released upon proof that duty had been paid on them. No offence having been committed in respect of these goods, the car should then have been released. No question of forfeiture arises under s. 127 of the Act in the circumtances. I accordingly confirm the order of the Magistrate returning the car to the respondent.

[11] In this case, it has not be shown the relevant circumstances where reasonable grounds of suspicion had arisen to suspect that the repaired Honda/plaintiff motorcar was uncustomed goods. In his affidavit in reply, one Md. Naeyem bin Abdul Mutalib, Penguasa Kastam, Jabatan Kastam Diraja Malaysia, Bahagian Pencegahan, Sungai Petani affirmed on 21 August 2006 at para 6 states *inter alia*:

> ... Seterusnya saya menyatakan bahawa kenderaan Plaintif telah ditahan oleh pihak Kastam untuk siasatan lanjut setelah disyaki ianya adalah barangan tak berkastam di bawah Akta Kastam, 1967.

[12] In his further affidavit affirmed on 9 February 2007, at para 6 states *inter alia*:

> ... kenderaan Plaintif telah ditahan setelah wujud sebab yang munasabah untuk **mengsyaki bahawa kenderaan tersebut adalah barangan belum lulus kastam** ...

[13] It was unclear whether Md Naeyem bin Abdul Mutalib was the custom officer who possessed reasonable grounds that the repaired Honda/plaintiff motorcar was uncustomed goods and seized it. Nowhere in his affidavit evidence and the exhibits annexed thereto to show circumtances to trigger reasonable cause or reason to suspect that the repaired Honda/plaintiff motorcar was uncustomed goods, an offence committed under the Customs Act or any regulation made thereunder. The reasonable cause of suspicion must exist before or at the time seizure is effected. In the absence of such reasonable cause, the seizure and detention

of the repaired Honda/plaintiff motorcar is therefore unlawful, contrary to art. 13(1) of the Federal Constitution which provides as follows:

> No person shall be deprived of property save in accordance with law.

[14] If I am wrong, there was no evidence shown that the repaired Honda/plaintiff motorcar was uncustomed goods. Upon seizure of the repaired Honda/plaintiff motorcar, it was immediately sent to the Department of Chemistry Malaysia at Penang for examination. It was certified that firstly, the entire panel of the chassis was cut and had been replaced, and secondly, the engine number which read B16A-541428 was not tampered.

[15] On 9 March 2006, the repaired Honda/plaintiff motorcar was taken to Syarikat Oriental Assemblers Sdn. Bhd., at Johor Bharu. Syarikat Oriental Assemblers Sdn. Bhd. is presumably the assembler of the Honda motorcars in Malaysia (hereinafter referred to as 'the assembler"). On examination by the assembler, it was revealed that its chassis number – EH5-904503 was the original number, but other features of the plaintiff motorcar were not the same as in assembler's records. The assembler certified that the plaintiff motorcar was not produced by them.

[16] But the RTD records disclosed that the repaired Honda/plaintiff motorcar was locally assembled (pemasangan tempatan). To this, the first defendant argued that the particulars in the RTD records were related or belonged to the original Honda motorcar and not the repaired Honda/plaintiff motorcar. The chassis number of the repaired Honda/plaintiff motorcar was taken from the original Honda motorcar. However, its physical features were believed by the first defendant to have been imported and thus uncustomed goods. But its importer was unknown and unidentified.

[17] As regard, the repaired Honda/plaintiff motorcar was locally assembled, the first defendant conceded that such particulars were indeed taken from the RTD records. And went on to say that the second defendant did not carry out physical examination on the repaired Honda/plaintiff motorcar (see para 6.5 at p. 16 & 17 of the defendants written submission). Here again the plaintiff could not be blamed for any inconsistencies or discrepancies found on the repaired Honda/plaintiff motorcar in comparison to its

registration certificate or the RTD records as they should be detected or ought to be have been defected by the second defendant.

Written Notice For The Return Of The Plaintiff Motorcar

[18] As the first defendant investigation in respect of the repaired Honda/plaintiff motorcar could not identify the offender that has committed the offence under the Customs Act 1967 or any regulation made thereunder, no prosecution was levied against anyone. The plaintiff, being the current registered owner of the said motorcar sought its return under s. 115. Sub-section (1)(a) of s. 115 reads as follows:

> **115. Return or disposal of movable property**
>
> (1) Where any movable property has been seized under this Act, a senior officer of customs may, at his discretion:
>
> a) temporarily return the movable property to the owner thereof or to the person from whose possession, custody or control it was seized, or to such person as a senior officer of customs may consider entitled thereto, subject to such terms and conditions as a senior officer of customs may impose, and, subject, in any case, to sufficient security being furnished to the satisfaction of a senior officer of customs that the movable property shall be surrendered to a senior officer of customs on demand being made by a senior officer of customs and that the said terms and conditions, if any, shall be complied with; or
>
> b) ...

[19] The plaintiff counsel, pursuant to s. 128(2) wrote a written notice dated 19 February 2006 informing the first defendant that the plaintiff was served with the chemist report and also the plaintiff counsel was informed by one Tuan Haji Othman Jusoh, Ketua Bahagian Pencegah, Sungai Petani that no offence had been committed in relation to the repaired Honda/plaintiff motorcar under the Customs Act 1967. However, the said Tuan Haji Othman proposed that the repaired Honda/plaintiff motorcar would be handed over to the second defendant for investigation under the Road Transport Act. The plaintiff objected to such a

course as the plaintiff motorcar was taken into custody for being suspected to be uncustomed goods under the Customs Act 1967 (see exh. "CSC4" annexed to the plaintiff affidavit in support affirmed on 25 April 2006). The said Tuan Haji Othman did not dispute or contradict the plaintiff allegation in exh. CSC4. It is usually treated as an admission or acceptance on his part: see Court of Appeal case of *Ng Hee Thoong & Anor v. Public Bank Bhd.* [1995] 1 CLJ 609 and Federal Court case of *Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn. Bhd.* [1986] 1 CLJ 2; [1986] CLJ (Rep) 45. However, the plaintiff motorcar was never handed over to RTD, instead the first defendant *vide* their letter dated 20 June 2006 informed the plaintiff that the plaintiff case was still being investigated under the Customs Act 1967. This showed the first defendant indeciveness and their investigation was coming to a dead end. In fact, the last investigation carried out by the first defendant on the repaired Honda/plaintiff motorcar was on 9 March 2006 when it was examined by the assembler. Since then, the repaired Honda/plaintiff motorcar remained in the custody of the first defendant. No further action was taken thereafter on the said motorcar.

[20] The plaintiff counsel sent a second letter dated 13 March 2006 to the first defendant pointing out the RTD records showed that the repaired Honda/plaintiff motorcar was locally assembled (pemasangan tempatan) and therefore the provisions of the Custom Act 1967 were inapplicable. This letter also reminded the first defendant that the repaired Honda/plaintiff motorcar was properly registered in the plaintiff's name. Therefore, the duty is imposed on the RTD as the Registrar of Motor Vehicles to inspect the repaired Honda/plaintiff motorcar submitted for registration or transfer of registration in accordance with s. 8, 10, 11 and 12. And the plaintiff was a *bona fide* purchaser in good faith. The plaintiff counsel requested the repaired Honda/plaintiff motorcar to be returned immediately, failing which proceedings would be filed in court. The plaintiff received similar reply from the first defendant in that the investigation was still pending under the Customs Act 1967.

[21] A third letter dated 16 March 2006 was sent by the plaintiff counsel to the first defendant requesting the repaired Honda/plaintiff motorcar to be released under s. 115 pending completion of the investigation. But this time there was no reply forthcoming from the first defendant. The first defendant failure to temporarily

released the repaired Honda/plaintiff motorcar to the plaintiff, the first defendant had failed to exercise their discretion fairly in the circumtances of this case under sub-section 1(a) of s. 115.

[22] Dissatisfied with the first defendant action, the plaintiff had, on 7 May 2006, filed an Originating Summons *vide* No: 24-805-06 seeking declarations and damages as follows:

(a) Satu deklarasi bahawa plaintif merupakan tuan punya berdafar kereta PDD 8281 yang sah dan bahawa defendan pertama dan defendan kedua tiada hak untuk mengganggu hak plaintif di bawah art. 13(1) Perlembagaan Persekutuan dan Akta Pengangkutan Jalan 1987 dan peraturan di bawah Akta tersebut.

(b) Satu deklarasi bahawa pendaftaran kereta tersebut oleh defendan kedua dengan No. Pendaftaran PDD 8281 dengan No. Enjin BIGA-5411428 No: Casis EH5-904503 yang dibuat pada 6 Oktober 1995 dan atau 21 Januari 2004 di bawah s. 10 Akta Pengangkutan Jalan adalah sahlaku dan mengikat defendan-defendan.

(c) Satu deklarasi bahawa penahanan kereta milikan plaintif oleh defendan pertama adalah tidak sah dan *mala fide*.

(d) bahawa defendan pertama melepaskan kereta PDD 8281 kepada plaintif tanpa syarat dan defendan kedua mengisu cukai jalan yang sah bagi motokar PDD 8281 tersebut.

(e) bahawa bayaran gantirugi diberi oleh defendan pertama kepada plaintif kerana telah menghindar hak plaintif di bawah art. 13(1) Perlembagaan Persekutuan dan Penolong Kanan Pendaftar Mahkamah diperintahkan untuk menentukan jumlah gantirugi.

Damages

[23] As adverted to earlier, the seizure of the repaired Honda/plaintiff motorcar by the officer of custom was made without reasonable cause or grounds. After the seizure, the investigation conducted by the first defendant did not establish that the repaired Honda/plaintiff motorcar was uncustomed goods. For that reason, no prosecution was instituted against anyone, including the plaintiff under s. 135.

[24] As there was no reasonable cause before or at the time of seizure to justify the detention or continued detention of the repaired Honda/plaintiff motorcar, the plaintiff is entitled, not only, for an order that the repaired Honda/plaintiff motorcar be returned to him but also damages. Section 132 provides as follows:

> **132. No cost of damages arising from seizure to be recoverable unless seizure without reasonable or probable cause**
>
> No person shall in any proceedings before any court in respect of the seizure of any goods seized in exercise or the purported exercise of any power conferred under this Act, be entitled to the costs of such proceedings or to any damages or other relief other than an order for the return of such goods or the payment of their value unless such seizure was made without reasonable or probable cause.

[25] Section 132 above is identical to s. 37A of the Sabah Forest Enactment 1968 which was considered in the case of *Syarikat Raspand v. Government of the State of Sabah* [2005] 7 CLJ 179. There the court held that the seizure was unlawful *albeit* on different grounds.

The Matter Was Referred To The Magistrate

[26] After two months the plaintiff filed the originating summons in this court, the first defendant had referred the plaintiff matter under s. 128(4) to the Magistrate at the Magistrate Court George Town, Penang *vide* Miscellaneous Application No. 82-92-06. Section 128 reads as follows:

> **128. Goods seized in respect of which there is no prosecution, or the proceeds of sale thereof, are forfeited if not claimed within one month**
>
> (1) If there be no prosecution with regard to any goods seized under this Act, such goods or the proceeds of sale of such goods which are held pursuant to paragraph (c) of subsection (1) of section 115 shall be taken and deemed to be forfeited at the expiration of one calendar month from the date of seizure of the goods unless, before such expiration:

(a) a claim to such goods or the proceeds of sale of such goods is made under subsection (2);

(b) a written application is made for the return of such goods under paragraph (a) or (b) of subsection (1) of section 115; or

(c) such goods are returned under the said paragraph (a) or (b).

(2) Any person asserting that he is the owner of such goods or the proceeds of sale of such goods, as the case may be, and that they are not liable to forfeiture may give written notice to a senior officer of customs that he claims the same.

(3) On the expiration of the period mentioned in subsection (1), or, if decision is made earlier that there be no prosecution with regard to the goods, on the making of the decision the senior officer of customs shall, if such goods or the proceeds of sale of such goods are not taken and deemed to be forfeited under that subsection, refer the claim to the Director General who may direct that such goods or the proceeds of sale of such goods or the security furnished under paragraph (a) or (b) of subsection (1) of section 115, as the case may be, be released or may direct such senior officer of customs, by information in the prescribed form, to refer the matter to a Magistrate of the First Class for his decision.

(4) The Magistrate of the First Class shall issue a summons requiring the person asserting that he is the owner of the goods or the proceeds of sale of such goods, and the person from whom the goods were seized, to appear before him, and upon their appearance or default to appear, due service of such summons being proved, the Magistrate of the First Class shall proceed to the examination of the matter, and upon proof that an offence against this Act or any regulations made thereunder has been committed and that such goods were the subject matter, or were used in the commission, of such offence, shall order such goods or the proceeds of sale of such goods or the amount secured under paragraph (a) or (b) of subsection (1) of section 115, as the case may be, to be forfeited, or in the absence of such proof, may order the release of such goods or the proceeds of sale of such goods or the security furnished under paragraph (a) or (b) of subsection (1) of section 115, as the case may be.

A (5) In any proceedings under subsection (4), section 119 shall apply to the person asserting that he is the owner of the goods and to the person from whom they were seized as if such owner or person had been the defendant in a prosecution under this Act.

B **[27]** Akin to s. 413 CPC, the duty imposed by s. 128(4) on the learned Magistrate to issue a summons to order the delivery of the property after holding an enquiry is mandatory: see *Asia Commercial Finance (M) Bhd v. PP* [1996] 1 LNS 308. The argument of Senior Federal Counsel for the defendants may be C summarised on two grounds, firstly, this court has no jurisdiction to hear and decide the plaintiff application herein as the jurisdiction was solely vested in the Magistrate under s. 128(4): see *Ketua Polis, Negeri Sembilan & Anor v. Manoharan a/l Dorasamy* [2004] 1 CLJ 101. Secondly, the plaintiff action should begun by way of D writ and not by originating summons as there are substantial dispute of facts: see *Pesurohjaya Ibu Kota Kuala Lumpur v. Public Trustee & Ors* [1971] 1 LNS 104. I find these arguments are without merit in the circumtances of this case.

E **[28]** At the hearing of the enquiry at the Magistrate's Court, George Town on 9 August 2006, the plaintiff counsel informed the learned Magistrate that the plaintiff application involved the same subject matter, that is, a Honda Civic motorcar, PDD 8281 which was pending in this court. The learned Magistrate adjourned F the enquiry. It was also submitted by the plaintiff counsel that the enquiry before the learned Magistrate was subsequently struck off as it was withdrawn by the defendants. Therefore, there is no enquiry to be heard by the learned Magistrate under s. 128(4). The defendants' motive for taking the matter to the Magistrate G Court, *albeit* belatedly is perhaps to adopt the view of Abdul Malek Ahmad FCJ in respect of the Magistrate power in s. 413 CPC enunciated in *Manoharan a/l Dorasamy*'s case *(supra)*. But the enquiry was subsequently withdrawn at the behest of the defendants is hard to understand. The defendants appear to be H uncertain in their action. Their action smacks *mala fide*.

[29] The cumulative facts and circumtances in this case are: the repaired Honda/plaintiff motorcar was never clearly established that it was uncustomed goods; the custom officer who suspected the I repaired Honda/plaintiff motorcar to be uncustomed goods did not appear to affirm any affidavit to depose that fact, there was no

dispute that the plaintiff was a *bona fide* purchaser in good faith, the repaired Honda/plaintiff motorcar was registered in the plaintiff's name and the motorcar was seized from his possession.

[30] I would, therefore, allowed the orders sought by the plaintiff in encl. 1 with costs.